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JOHN T. FEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 651

LORAN S. CLARK,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

LORAN S. CLARK,
1357 Winona Avenue,
Chicago 40, Illinois,
Petitioner
Appearing Pro Se.

The Scheffer Press, Inc.—ANdover 3-6850

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THE UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Loran S. Clark, prays that a writ of certiorari be issued to review the decision of the Supreme Court of the State of Illinois in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the Criminal Court of Cook County, Illinois, was entered on October 15, 1954 and it appears in the record filed with and certified by the Clerk of the Supreme Court of the State of Illinois and transmitted herewith. The record was not printed for use of the Supreme Court of Illinois but was considered on the typewritten stenographic transcript and certified record of the trial Court of the Criminal Court of Cook County, Illinois.

The opinion of the Supreme Court of the State of Illinois, affirming the aforementioned judgment, was filed May 23, 1956, and is not reported but is set forth in the Appendix herein and in the certified copy of the Record.

JURISDICTION.

On September 24, 1956, it was ordered that the petition for rehearing be denied. (This order appears in the Appendix) This petition is filed within 90 days of the denial of the petition for rehearing in the Supreme Court of Illinois. The jurisdiction of this Court is invoked under Section 28 U.S.C. Section 1257. (3) 62 Stat. 929.

QUESTIONS PRESENTED.

1. Was the defendant deprived of his Constitutional Rights of a fair and impartial trial as provided by the Sixth Amendment of the Constitution, when the defendant's counsel had two cases on the same day, before the same judge, for the same defendant and defendant's counsel apprised the court of the fact that he was prepared in the one case and was ready to try it, but that *he had done no work at all on the case now under review,* whereupon defendant's counsel made a motion for a continuance of two days, in the case at bar, in order to prepare a defense for defendant, which was forthwith denied and defendant was forced to trial instanter, thus depriving defendant of the undivided assistance of counsel?

2. Was the admission of other alleged offenses over defendant's counsel's objection of offenses of four years previous, wholly unconnected with the crime as charged in the indictment and being no part of the res gestae and did not tend to prove the crime as charged, deprive defendant of a fair and impartial trial and constitute reversible error?

3. Was it reversible error when the evidence given by the complaining witness was in derogation of the State's allegations as to the crime charged in the indictment and the state failed to prove the offense beyond all reasonable doubt and the testimony clearly shows that the evidence does not support the verdict?

STATEMENT OF THE CASE.

The petitioner was convicted of larcency by bailee in a trial by the Court with a Jury. The trial commenced September 13, 1954; a jury was empanelled, selected and sworn on the same day, September 13, 1954. On September 16, 1954, at the close of the State's case, petitioner's motion for a directed verdict of not guilty was made and denied. On September 17, 1954, the jury returned a verdict of guilty of larceny by embezzlement in manner and form charged in the indictment, and further find from the evidence that the value of the property so converted, to be $235, and we further find from the evidence that the defendant Loran S. Clark is about the age of 58 years. September 17, 1954 there was Judgment on the Verdict, Guilty of Larcency by Embezzlement. A motion by defendant for a new trial, entered and allowed and hearing set for October 15, 1954. On October 15, 1954, the Court overruled a motion for a new trial and fixed bond, on appeal, in the sum of $1,500 which bond was filed with the Clerk of the Court. On October 15, 1954 Judgment on the Verdict was rendered;—that Loran S. Clark be sentenced to the Illinois State Penitentiary for a term of not less than one year and not more than two years for the crime which he stands convicted. On October 15, 1954 the Court ordered the same bond to stand.

The indictment was obtained January 27, 1954 and contained four counts. Count (1) stated that the defendant

did feloniously take and carry away said personal goods, funds, money and property of said Mabel Josephson. Count No. (2) set forth that Loran S. Clark did feloniously steal, take and carry away said personal goods, funds, check, money and property of said Mabel Josephson. Count No. (3) recited that Loran S. Clark did feloniously steal, take and carry away said personal goods, funds, money and property of Mabel Josephson. Count No. (4) set out that defendant did then and there felonicusly steal, take and carry away the personal foods, money, check and instrument in writing of the value of Two Hundred and Thirty-five Dollars, lawful money of the United States of America contrary to the Statute.

EVIDENCE.

The evidence consisted of the testimony of the following witnesses for the State: Mabel S. Josephson, complainant; Conrad Nadowski, attorney for the Avondale Savings and Loan Association; George A. Hawley, attorney for Hill-Behan Lumber Company; George E. Dolezal, attorney for Western Federal Savings and Loan Association; Agnes Olsen, assistant trust officer for the Cosmopolitan Bank; Harry G. Ollestad, trust agent for the Chicago Title and Trust Company; Norman Dexheimer, auditor for the North Shore National Bank of Chicago; Robert S. Diehl, real estate, and Ilene Davidson, house wife. (Abst., Index, ii and iii)

The evidence for the defense was the testimony of Loran S. Clark, petitioner. (Abst. Index, iii.)

Mabel Josephson testified on direct examination that she had known Mr. Clark, the petitioner, since 1949; that he had handled legal matters for her husband; that Mr. Clark probated her mother's estate in which she was administratrix. The witness stated that Mr. Clark called her

prior to September 13, 1952 in reference to my husband I going over to the Avondale Savings and Loan on September 13, 1952; at the time he talked to me he told me to bring $235 with us. So on September 13, 1952, Mr. Clark met us and we went to Avondale. He had me sign some papers and told me to get a cashier's check for him at the Avondale. She testified that Clark said that the money was to be used for commission to Avondale but *she did not understand that the money was to be used for a Trustee's fee at the Cosmopolitan Bank* (Abst. pp. 26-27). The witness further testified that Mr. Clark and I went to the Cosmopolitan Bank after leaving the Avondale and when at the Cosmopolitan Bank Mr. Clark went over and talked to Mrs. Olsen for fifteen or twenty minutes and then came back to her where she was sitting by the door and asked her to give him the check and $5.00 more, so she endorsed the check over to Mr. Clark and gave him the $5.00; he then went back and talked to Mrs. Olsen a few minutes and came back and said that everything was taken care of; then he dropped me off in a cab at my home.

Mrs. Josephson on cross-examination stated that she had paid Mr. Clark, *$50 for representing her in the Hill-Behan case,* but she does not know how much more (Abst. pp. 33).

On re-direct examination Mrs. Josephson testified that Mr. Clark had represented her in her mother's estate in 1949 (Abst. p. 35) that she had paid $1020 and that he had not accounted for or given back $420 (Abst. p. 37).

Conrad Nadowski, attorney for Avondale Savings and Loan Association (People's Witness) testified on direct examination that there was an application made for a mortgage of $10,000 at Avondale Savings and Loan Association in the month of September 1952 on the property

at 4850 North Hermitage Avenue and at the time there was a land trust, No. 1456 at the Cosmopolitan Bank covering the property; that the letter of opinion was issued on September 26, 1952. Subsequently, Nadowski said that he sent a copy of the letter of opinion to Mr. Clark so as to have the objections cleared up, because his company would not make a mortgage until the title was clear. (Abst. pp. 40-41). December came and the objections were not cleared up so on January 6, 1953, another letter of opinion was ordered which showed that the Western Federal had started foreclosure proceedings. About 10 days before Christmas, 1952, a Mr. Diehl called me in reference to the Josephson re-financing deal and then again between January 10th, and 23rd, 1952 and I told him at that time that Mr. Clark had not closed the deal as yet; so he then proceeded to make an appointment to close on January 23rd, 1953 at the Title Company. Nadowski testified that at the escrow meeting, Mabel Josephson put up $531 and Mr. Diehl put up $331 and the Western Federal deposited their release of the mortgage and a dismissal of the foreclosure proceedings, and at the time a release of the mechanic's lien was deposited and Avondale paid in $9,343.39 to pay the old mortgage and the deal was closed and Avondale's mortgage became a first mortgage lien.

Mr. Nadowski stated that the commission was based upon the amount of the mortgage when made and was part of the closing expenses. (Abst. pp. 40-44).

Agnes Olsen, assistant Trust Officer at the Cosmopolitan Bank testified on direct examination that she opened a land trust for the property owned by Mabel Josephson, located at 4850 North Hermitage Avenue and that the trust was started by Mr. Clark, the petitioner, and was entered into September 15, 1952; that previously a land

trust was in effect at the La Salle National Bank so as to have their trust effective, a trustee's deed had to be conveyed by the La Salle National Bank, thru a go-between, Mildred Hackel, to the Cosmopolitan Bank. Mrs. Olsen further testified that the Cosmopolitan Bank, by virtue of their land trust, No. 1456 and directions thereunder, signed the mortgage and notes with Avondale Savings on the property at 4850 North Hermitage in the amount of $10,000; that the first year's trustee's fee was $35; that she talked with Mrs. Josephson about the bill and that Josephson told her that sufficient money had been given Mr. Clerk to take care of the Trustee's fee so she wrote Mr. Clark and told him that inasmuch as sufficient money had been left with him for the fee that he should pay it, but she never heard from him. (Abst. pp. 51-53.)

Norman Dexheimer, auditor for the North Shore National Bank testified that he was subpoenaed by the State's Attorney to bring in the ledger account of Loran S. Clark from its inception on July 11, 1951, to March 20, 1953 consisting of eleven ledger pages. The witness also testified that he was subpoenaed to bring the deposit slip of Loran S. Clark for September 13, 1952; that at the opening of business on that day, Mr. Clark's balance was $22.45; that on September 13, 1952 the deposit slip showed $235 deposit with $10 returned in cash; that the balance at the close of business September 13, 1952 showed a balance of $195.95. (Abst. pp. 66-67.)

Mr. Dexheimer testified that he was subpoenaed to bring in the returned check register and that it covered a period from January 2, 1952 to January 15, 1953; that it showed a debit of 50 cents for a returned check on September 13, 1952 and a debit of $1.00 for two checks on September 11, 1952.

George A. Hawley, attorney for Hill-Behan Lumber Company, testified on direct examination that he had a lien against Mabel Josephson, for his client, Hill-Behan Lumber Co.; that he garnished Josephson's tenant and received the money from the tenant that was due the Josephsons; that there was a balance left; that Mr. Clark called at his office twice and telephoned him several times about paying off the garnishee but that he did not do so and he was forced to garnishee again,—a Mr. Siegal. Mr. Siegal called him and told him that Mrs. Josephson said that she had given Mr. Clark the money to pay the garnishment so he asked Mr. Clark if Josephson had given him the money and he said "No." Hawley further testified that on January 23rd. Mr. Clark and Mr. Diehl came into his office and Mr. Diehl, at that time, paid the balance of the garnishment off and that he gave him a satisfaction of lien and released it of record. (Abst. pp. 46-48.)

Robert S. Diehl, Sr. testified that he met Mrs. Josephson about 10 days before Christmas 1952, thru her husband who had been doing some work for him and that he talked with her about the condition of her home; that he talked with Mr. Clark, about this date, over the telephone; about the Josephson's property and asked him if he had the $240; that Clark said that he was closing the deal next week, so he called the Avondale between the 10th and 23rd of January 1953 and asked the Avondale if Clark had closed the deal for Josephsons and they said "No." So he then called up the Western Federal Savings and made an appointment with Mr. Dolezal to close the deal at the Title Co. on January 23rd 1953. (Abst. pp. 69-75.)

Mr. Dolezal, attorney for the Western Federal Savings testified on direct examination, that he had dealings with Loran S. Clark, attorney for Josephsons in reference to

ement of a mortgage held by Western Federal on ephson property located at 4850 North Hermitage during the month of August, 1952; that the Jos were in default on their mortgage and his com- notified Josephsons that foreclosure would be unless some payments were made. Subsequently, ark called him and asked him to forbear fore- because refinancing was on its way. Dolezal testi- at he sent a statement to Clark August 7, 1952 the Josephsons' indebtedness of $9,876.55 includ- ncipal and interest and release fee; that he held eclosure proceedings on Clark's request until De- 1, 1952; at which time he filed a foreclosure suit; ently, Mr. Clark called and asked to forbear de- the Josephsons, which he did, but as time went e prepared to default the Josephsons; that about e, a Mr. Diehl called him and made arrangements him appear at an escrow meeting set for January 3 and deposit a mortgage release and dismissal foreclosure proceedings and that he received pay- f his attorney's fees of $100 and costs of $29.05 foreclosure. (Abst. pp. 48-51.)

y G. Ollestad, and escrow agent for the Chicago nd Trust Company stated that he acted as agent escrow wherein the Avondale Savings and Loan tion and Mabel S. Josephson, beneficiary under No. 1456 with the Cosmopolitan Bank, as trustee, e Western Federal Savings and Loan Company rincipals. He testified that the escrow was set up y 23rd, 1953 and it provided for the filing of the tion of the Hill-Behan lien; and dismissal of the sure suit by Western Federal and the satisfaction first mortgage lien held by Western Federal Sav- d Loan and the deposit of $9,343.39 in escrow by y Avondale Savings and Loan. Ollestad testified

that Mrs. Josephson put up $531 and Mr. Diehl put up $331 for closing expenses and costs and that was all the money that was needed and everything was wound up. (Abst. p. 54.)

Loran S. Clark, petitioner, on direct examination, testified that he handled an estate for Mrs. Josephson in 1949 valued at $14,000 and that the only thing which was keeping the estate open was the payment of $120, the American Bonding fee which Mrs. Josephson never paid. (Abst. pp. 81-82.)

Witness Clark further testified that Mrs. Josephson asked him in June 1952 to go down to Western Federal Savings and Loan Company with her to try to get an extension or re-instatement of her mortgage; time in which to catch up the arrearage. The mortgage was about seven months behind at this time at $127 per month; that he had many conferences with Mr. Hurta, President of the Western Federal and that Mr. Hurta agreed to go along with Mrs. Josephson, when, in his office, she promised to keep up the payments and catch up on the arrearage. But time went along and Josephson did not keep her promise, so in August, Mr. Hurta told Mr. Clark that he would have to do something about foreclosing. At that time, Clark told Mr. Hurta that he was trying to refinance the mortgage; that he tried many loan companies, but in each case they did not want to make a loan to people who were in arrears, and for that reason were considered a poor risk; and also the building was about 60 years old.

The witness further testified that at the time he made application for the loan at Avondale Savings he tried to make the loan for $10,500 because he realized additional money would be needed to close the mortgage financing; somewhere in the neighborhood of $700 for

incidental expenses such as commissions, tax reserve, taxes for the curre year, filing fees and different fees; that on June 17, 1952, he set up a land trust with the La Salle National Bank on the Josephson property, because she had a code of suits filed against her, and that it would be easier to make a mortgage and bring title down if the land was in trust; there was charge of $40 for this trust (Abstp. 85) and that he paid the $40; that he later cancelled the land trust because Avondale objected to a couple of clauses in the land trust at the La Salle Bank but said that The Cosmopolitan Bank had a trust agreement which was satisfactory to them; consequently he set up a land trust at the Cosmopolitan Bank; that he never was paid for these services at the time or reimbursed for the $40 which he had paid out for the La Salle Trust, but later received payment on September 13, 1952; $40 or reimbursement for the La Salle Trust fee and $200 legal fees for legal services in the extension of the mortgage and getting a company to re-finance the loan.

The witness further testified that he represented the Josephsons in a case entitled *Hill-Behan* v. *John D. Josephson and Mabl Josephson* in which there was claim for $906.65; that a judgment was entered in the case against John D. Josephson and Mabel Josephson for $165.65, which later resulted in a mechanics lien against Mabel Josephson; that he charged $50 for legal fees and was paid July 24, 1952 by Mrs. Josephson (Abst. p. 86). The receipt read "July 25, 1952, Received from Mabel Josephson in re *Hill-Behan* v. *Josephson* $50. Loran S. Clark" (Abst. 33).

The witness futher stated that he made a special assessment search in the tax matter concerning the Park Ridge lots which were in the estate of Mabel Josephson's

mother; that the search covered back taxes and specials and generals; amount of penalties along with forfeitures, under date of August 1, 1951 (Abst. p. 88) and that he brought down the title under the Torrens System by filing a case in the Circuit Court of Cook County and one year thereafter got the certificate of title and turned it over to Mr. Josephson because he said that he had met a man by the name of Diehl and he was going to loan Josephson some money and he did not want me to handle the matter any longer.

Clark testified that he had a conversation with Diehl, the State's witness, in front of the Title Company on January 23, 1953 and Diehl said to Clark that he owed Josephson $240 and Clark said that he did not owe Josephson because that was a fee and they owed considerable more; that he, Diehl said to me, "Well, every attorney is entitled to a fee in every case."

REASONS FOR GRANTING THE WRIT.

The importance of this case lies in the fact that defendant did not receive a fair and impartial trial, thus his Constitutional Rights were invaded and for reasons cites the following: (1) That defendant's counsel filed his appearance on June 21st, 1954 but did not represent defendant in open court on that day, having filed his appearance with the Clerk. However, the reviewing court (Appendix, p. 1a), in its opinion, states, that defendant's attorney filed his appearance on June 21, 1954 and that a motion was filed and allowed for a chance of venue, on that day, which would lead one to believe that defendant's counsel had filed the motion for a change of venue, but on the contrary defendant filed the motion, *pro se.*

The reviewing court sets forth on (Appendix, 11a) of its opinion that a continuance depends upon the particular

facts and circumstances surrounding the request. In the case, at bar, we have a trial which took one week to try and comprised a record of approximately 700 pages. Even though Paul F. Hayzlett had filed his appearance on June 21, 1954, the last days before vacation term, and appeared for the defendant on September 13, 1954, the first day of Court of the fall term and it being his first day in open court for the defendant and that he had two cases for the same defendant, on the same calendar, before the same judge on the same day; and that he informed the Court that he was prepared in the one case, 54-1076, but not in the case now under review, because he had *done no work at all* in acquainting himself with the case, whereupon defendant's counsel made a motion for a continuance of two days so as to prepare a defense for defendant, which was forthwith denied and defendant was ordered to trial instanter. The fact remains however, that defendant's counsel had not been dilatory or showed lack of diligence because he had one of defendant's cases prepared and so informed the Court, but in the case at bar, defendant was put in the position, by the Court's ruling, of not having the undivided assistance of Counsel.

Defendant's counsel, in Chambers objected to the Court allowing anything to go into evidence with exception of the amount of the check for $235; the negotiations regarding the loan, the extension of the loan, the land trust; just the particular transaction involving the $235. (Abst. p. 29.)

The trial court overruled defendant's objection and based its opinion on *People* v. *O'Malley,* 404 Ill. 165. (Abst. p. 30.)

In the *O'Malley* case, the indictment charged embezzlement of $1,000 for stock sold out of the probate estate. All the transactions were part of the one probate estate and all happening within a short period of a few months

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witness's mother's estate of four years
Abst. p. 79) which was not connected
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part of the *res gestae*. It was in this
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and had no connection with the offense charged in the indictment, the embezzlement of $235. Based upon the reviewing court's own words, the case of four years previous with the accusation of embezzlement therein would be incompetent and irrelevant evidence to show intent.

However, the alleged offenses of three or four years previous, in the present case, as presented by the State's Attorney, cannot judicially come under the classification of competent evidence under the interpretation of the reviewing court's own words.

The statement of the reviewing court that in their opinion all of said acts occurred within a two year period of time prior to the act of embezzlement, which was January 23, 1953,—for which the defendant was tried (Appendix, viii a) is a glaring error of the reviewing court when the record clearly reveals, by the testimony of the complaining witness, that her mother's estate was probated in 1949, in which defendant represented her, which is a full four years. (Abst. p. 35.) It was in this case that the State alleged that the defendant had converted $420, which was not supported by the testimony of the complaining witness, but was allowed to go to the jury to the irreparable damage of defendant's right to a fair and impartial trial.

There was a violation of defendant's right to a fair and impartial trial when the State alleged as part of their case that the complaining witness had given defendant $50 with which to satisfy a mechanic's lien and that he did not account for the money or pay the lien. It is a startling omission of the reviewing court to overlook the testimony of the complaining witness when she said that, I did not pay Mr. Clark any more than $50 for representing me in *Hill-Behan* case (Abst. p. 33) in 1952. The receipt

reads as follows: "July 25, 1952, Received from Mabel Josephson, in re Hill-Behan v. Josephson, $50. Loren S. Clark." It is unmistakably clear that the State did not prove a conversion of this $50, as they claimed, in the face of complaining witness's testimony and there was no proof beyond a reasonable doubt of the charge made by the State.

The State in their portrayal of evidence before the jury stated that in the complaining witness's mother's estate, the defendant had failed to account for $420 or pay it back. The State's Attorney arrived at this figure by leading the witness and doing her calculations; however, in spite of this behavior, the witness testified that she had given defendant $1020 (Abst. p. 37) and this was made up by a check for $440 for attorney's fees and another check for $500 for attorney's fees and $80 for court costs. (Abst. p. 37).

The defendant testified that he paid $120 for a bond (costs) in the estate (Abst. p. 108). So the testimony here does not support the State's claim that the defendhad converted $420 in the estate back in 1949. Moreover, this alleged offense is four years previous, not connected with the crime charged in the indictment and does not tend to prove the particular offense charged, nor is it a part of the *res gestae* and does not show a particular intent or motive in defendant's connection with the offense charged.

Then again, the People introduced evidence that defendant received $20 from the complaining witness in May 1952 to effect transfer of title of the Park Ridge lots which were contained the 1949 estate's inventory. The reviewing court overlooked the statement of defendant that he had a special search made on the Park Ridge lots and it covered back taxes; special assessments and general taxes. So this substantiates the reason for

the payment of the $20 in reference to the title of the Park Ridge lots which were a part of the inventory in the 1949 estate.

In passing, defendant contends that this transaction is not connected with the offense charged in the indictment.

Defendant's right to a fair and impartial trial was further invaded in that the evidence did not support the verdict when according to the indictment, the defendant fraudulently embezzled and converted to his own use $235. The reviewing court clearly and unmistakably omits the evidence of the complaining witness, in arriving at their conclusion; wherein she testified, that she did not understand that the money was to be used for a Trustee's fee at the Cosmopolitan Bank. (Abst. p. 27) The Reviewing Court goes on to set forth that the testimony does not create a reasonable doubt of defendant's guilt.

It is contended by defendant that this testimony does not support the verdict and that the State did not prove beyond a reasonable doubt the offense charged in the indictment and the guilt of the defendant.

In further support of defendant's contention, the remaining $200—of the $235—which the State alleged defendant converted which was allegedly paid for commission to be paid to Avondale; it should be noted that Conrad Nadowski testified that his company, The Avondale Savings and Loan Association would not make a mortgage (loan) until the title was clear; he further stated that the letter of opinion was issued September 26, 1952 (Abst. p. 41),—thirteen days after Josephson said that she paid the $200 for commission—Hence, when defendant and the complaining witness went over to Avondale on September 13, 1952, the day the complaining witness gave defendant the check for $235 and $5 additional, it is clear that Avondale, the defendant or the complaining witness did not know whether or not a loan would be

made *at all* because it was 13 days previous to receiving the letter of opinion, so at the time, Avondale knew nothing about the title; therefore could not set down the amount of commission on that day, September 13, 1952. The record shows that the amount of the commission was set down in the closing statement, January 23, 1953.

Therefore the State, again, did not prove beyond *a reasonable* doubt, their claim that the money was given for a commission and not for a fee.

The introduction of the ledger account of Loran S. Clark from its inception on July 1, 1951 to March 20, 1953 and the introduction of the returned check ledger from January 2, 1952 to January 20, 1953, at the North Shore National Bank which was allowed to go to the jury over defendant's counsel's objection did irreparable damage to the defendant and should not have been admissible on the grounds of showing financial standing (Abst. pp. 66-68) and in support of this contention, defendant cites the following: 42 Ill. Appellate 350, which states: Evidence of financial standing is not admissible in a case of embezzlement. (Abst. p. 60.)

The testimony of the defendant in that he paid $40 to the La Salle National Bank for a trustee's fee for the property of Mabel Josephson at 4850 North Hermitage, before he could cancel the existing trust so as to set up a favorable trust to Avondale Savings and Loan, with the Cosmopolitan Bank (Abst. p. 85) and the fact that defendant asked Josephson for $40 and not $35 for the reimbursement, tends to substantiate defendant's contention that the $40 was to reimburse him, especially in the light of complaining witness's testimony, when she said that she did not understand that the money was to be used for a Trustee's fee at the Cosmopolitan Bank (Abst. p. 27.)

POINTS AND AUTHORITIES.

Defendant's constitutional rights were invaded by the Court in overruling defendant's counsel's motion for a continuance, or short duration, in order to prepare his defense for trial, inasmuch as, he, the defendant's counsel, was totally unprepared. The Court in so doing denied defendant a fair and impartial trial.

Petitioner contends he was denied a fair and impartial trial and that his Constitutional Rights were invaded and in support thereof says that the Court in denying a motion for a continuance of two days and forcing him to trial instanter, in view of circumstances surrounding the motion; when defendant's counsel had two cases for the same defendant, the same day, before the same judge, and when he was prepared to go to trial on the one case and informed the Court so, and apprised the Court that he had done no work at all on the case now under review, that the Court deprived defendant the undivided assistance of counsel by not allowing the short continuance of two days to prepare a defense.

Further, in support of petitioner's contention, he cites the following:

In *Glasser* v. *U. S.*, 315 U. S. 60, the Court said that, the trial judge has the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused, and he should protect the right of an accused to have the undivided assistance of counsel.

And further the Court sets out, in the same case, that, Constitutional safeguards, including those of the Sixth Amendment, should in all cases be jealously preserved for the benefit of the accused, particularly where the scales of justice may be delicately poised between guilt

and innocence and, in that event, error which under some circumstances would not be grounds for reversal cannot be brushed aside as immaterial.

The Court erred in overruling the objection of defendant's counsel wherein he objected to the introduction in evidence of other transactions not relative to the offense charged in the indictment, and not part of the res gestae.

Petitioner contends that the trial Court in allowing other alleged offenses to go into evidence and go to the jury over defendant's counsel's objection; offenses which clearly come under the following principles of law, contentions and citations, is prejudicial error and denies defendant a fair and impartial trial.

And in support thereof, petitioner contends that the evidence must be confined strictly to the offense charged in the indictment and evidence which does not fairly tend to prove the particular offense charged, nor has no legitimate bearing on the question of defendant's guilt and is wholly unconnected, is inadmissible, and when the evidence is not part of the *res gestae* or shows or tends to show intent or motive, in defendant's connection with the crime, and the time between the crime charged and the offense concerning which testimony is offered is too remote, that the evidence is inadmissible.

Further, in support of petitioner's contention, the Court is asked to consider:

Thompson v. *Bowie,* 71 U. S. 463; 4 Wall. 463, 18 L. Ed. 423 reversing 1864, 6 D. C. 91, in which the Court sets forth, that, all evidence must have relevancy to the question in issue and tend to prove it, and if not a link in the chain of proof, it is not properly receivable.

See also, *Macon County* v. *Shores,* 97 U. S. 272, 24 L. Ed. 869 wherein the Court held that, irrelevant and in-

competent testimony should be carefully excluded because the tendency of both is to mislead and confuse the minds of the jury and thus defeat the ends of justice.

Also, *Wood* v. *U. S.*, 41 U. S. 342, the court said that, evidence not directly comprehended within an issue is inadmissible.

Further, in *Beaver* v. *Taylor*, 68 U. S. 637, the Court said that, supplemental facts which so illustrate and characterize principal facts as to constitute the *whole one transaction*, and render supplemental facts necessary to exhibit the principal fact in its true light and give it proper effect are admissible as part of the *res gestae*.

In *Lucas* v. *Brooks*, 85 U. S. 436; 18 Wall. 436; 21 L. Ed. 779, the Court says that, evidence which may divert the attention of the jury from the real issue, that is to say,—immaterial evidence should be kept from the jury.

In *Anderson* v. *U. S.*, 18 S. Ct. 689; 170 U. S. 481; 42 L. Ed. 1116, the Court said that in the trial of the defendant, who was one of the crew of a vessel, for the killing of the mate, evidence of ill treatment of defendant by the captain who was first killed by defendant, prior to the day of the homicide, is not admissible; *there being no evidence to so connect* it with the killing of the mate so as to render it a *part of the res gestae*.

Petitioner contends that a reasonable doubt is such doubt adduced from the evidence by the jury that it would cause a prudent man to exercise such reason and prudence as he would exercise in the most important affair of life, and would cause a reasonable and prudent man to hesitate and pause.

In the present case, the complaining witness stated in one instance (Abst. p. 27) that she did not understand

that the money (meaning the $235 set forth in the indictment) was to be used for a Trustee's fee at the Cosmopolitan Bank. The trustee's fee being set forth as $35 and part of the State's charge of the embezzlement of $235 as charged in the indictment. Such a statement would on its face, cause a prudent man to pause and hesitate about his decision of defendant's guilt.

Then again, the State claims that the remainder of the $235, being $200, was for Avondale commission; this is highly speculative, in that, Avondale, according to Nadowski's testimony, (Abst. p. 41) did not have the letter of opinion until September 26, 1952 and did not know, up to that date, if a loan would be made at all upon which a commission could be figured; the date being approximately two weeks subsequent to the date the complaining witness, on September 13, 1952 claimed she gave $235 plus $5; $200 of which was for commission instead of a legal fee to defendant for his work of re-financing. The evidence is clear that the defendant had done a great deal of work in re-financing the loan and he asserted that the $200 was for legal fees and the $40; $35 plus $5 was for reimbursing him for the trustee's fee to the La Salle National Bank which was paid by defendant out of his own funds.

It is a conclusive contention by the petitioner that the evidence of defendant's guilt of the offense charged in the indictment was not proved beyond a reasonable doubt and that the evidence did not support the verdict.

Petitioner, in support of his contention, cites the following:

McGinnis v. *U. S.*, 256 F. 621, 167 C.C.A. 651, in which the Court sets forth that, the State must establish guilt beyond a reasonable doubt.

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Also in *U. S.* v. *McHugh*, 253 F. 224, the Court states that, a reasonable doubt "is such a doubt as would make a man of ordinary prudence and sensibility and decision, in determining an issue of like concern to himself, pause and hesitate in arriving at his conclusions, and is the criterion for the jury in a criminal prosecution.

In *Singer* v. *U. S.*, 278 Federal 415, certiorari denied 42 S. Ct. 272, 258 U.S. 620, 66 L. Ed. 795, the Court states that, the reasonable doubt contemplated by the law must arise from the evidence which includes want of evidence and can arise from no other legitimate source.

In *People* v. *Burke*, 145 N.E. 164, 313 Ill. 411, guilt of a person accused of a crime cannot rest upon guess, surmise or speculation, but must be proved by evidence establishing beyond a reasonable doubt every material element of the crime charged.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LORAN S. CLARK,
Petitioner, Appearing pro se.

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APPENDIX.

OPINION.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 33831
January 1956

People of the State of Illinois
Defendant in Error
vs.
Loran S. Clark,
Plaintiff in Error
} Error
Criminal Court
Cook County

May 23, 1956

MR. JUSTICE DAILY DELIVERED THE OPINION OF THE COURT:
Defendant, Loran S. Clark, prosecutes this writ of error to review a judgment of the criminal court of Cook County entered on a jury verdict finding him guilty of larceny by embezzlement. He was sentenced to imprisonment in the penitentiary for a term of not less than one year nor more than two years.

Recourse to the record discloses that on May 3, 1954, two indictments had been returned to the criminal court against the defendant. By one of them, No. 54-1075, he was charged with larceny by embezzlement of the sum of $235 from Mabel J. Josephson. The nature of the other charge does not appear. On the day named, defendant who was an attorney, (see In re Clark, 8 Ill. 2d

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314,) filed his appearance pro se and, upon arraignment, entered a plea of not guilty. At the time the cause was set for trial on June 14, 1954. When that day arrived the People were ready for trial but defendant moved for a continuance, stating that he was going to be represented by an attorney named McClory who would be able to go to trial in one week. The court granted the motion for continuance and, after open discussion with the assistant State's Attorney in defendant's presence, expressly advised the defendant as follows: "You are on trial a week from today in indictment No. 57-1075. * * * The other one will be continued to the same date. A week later, on June 21, 1954 Attorney Paul F. Hayzlett filed his appearance as defendant's counsel, a motion for a change of venue was filed and allowed, and the cause transferred to the chief justice of the criminal court for reassignment. Thereafter it was continued by agreement to July 7, 1954, and that date was assigned for trial on September 13, 1954. On the latter date Hayzlett and defendant appeared and sought further continuance of three days which was denied when it appeared the People and their witnesses were ready for trial. Hayzlett informed the court he was prepared to proceed with the other charge against defendant but that he was unprepared in cause No. 54-1075, which is the one involved in this review. The trial court, taking notice that defendant had been expressly advised of the People's election to first proceed in cause No. 54-1075, ruled that ample opportunity had been given to prepare a defense and ordered that the trial would begin after recess of several hours. As one of his numerous assignments of error, defendant now contends that the court's refusal to grant his counsel a continuance was an invasion of constitutional right to a fair trial.

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The granting of a continuance to permit preparation for a case necessarily depends upon the particular facts and circumstances surrounding the request, and is matter resting within the sound judicial discretion of the trial court. Its decision will not be disturbed upon review unless it is clearly shown that such discretion has been abused (*People* v. *Quevreaus,* 407 Ill. 176; *People* v. *Ritcheson,* 396, Ill. 146) The record in the instant case shows that the claim of unpreparedness, upon which the request for further continuance was based, was made five months after the indictment and been returned against defendant; three months after the cause had been continued, with the People ready for trial, in order to permit defendant to arrange for counsel; three months after defendant had been expressly notified he would be first tried in cause No. 54-1075; three months after Hayzlett had filed his appearance in the cause and three months after additional delay had been won through a motion for a change of venue. Little merit, therefore, can be found in the present claim that time to prepare a defense was arbitrarily denied to defendant. Additionally, there is no showing that defense counsel was overmatched in the trial or that the defense was prejudiced or embarrassed by proceeding to trial when it did. Under all circumstances, which create some doubts as to the sincerity of the defendant's motives, we are unable to say the trial court abused its discretion in refusing to permit defendant to delay further. Cf. *People* v. *Martin,* 376 Ill. 569.

By another assignment of error defendant urges that he was poorly defended and that the trial court erred in not intervening in his behalf, while permitting the prosecution to take advantage of his counsel's incompetence. A similar contention was made and rejected in *People* v. *Stephens,* 6 Ill. 2d 257. We held there that although the

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trial court has the duty of assuring a defendant a fair trial, it has no duty to intervene where a defendant is represented by counsel of his own choice, merely because the court feels counsel is not experienced or skilful. This principle, we believe, is singularly applicable where, as here, the defendant exercising his choice of counsel was himself a practicing attorney. Further, as is also set forth in the *Stephens* case, a conviction will not be reversed for poor representation unless it can be said from the record that the representation was of such low caliber as to amount to no representation at all, or that it was such as to reduce the trial to a farce. We find nothing in the record of defendant's conviction which approximates either condition. Neither do we find any indication that defendant was dissatisfied with his counsel's conduct of the defense until after the final result had been reached. There, is therefore, no merit to the contention that the court's failure to intervene denied defendant a fair trial.

The next contention of defendant is that the closing remarks of the assistant State's Attorney were so prejudicial and inflammatory as to warrant a reversal of his conviction. Although defendant's brief and argument contains what purports to be an excerpt of the prosecutor's summation to the jury, the abstract, by which this court is guided in its consideration of the errors assigned, does not include either the argument complained of or showing that any objection was made and a ruling of the court obtained thereon. While we remark in passing that the language of the excerpt does not appear to exceed the bounds of legitimate argument, it is sufficient answer to this claim of defendant to point out that the failure of the party raising such issue to include the argument in the abstract of record, together with a showing of objections and rulings thereon, precludes this

court from considering the issue on review. *People* v. *Ritcheson,* 396 Ill. 146; *People* v. *McDonald,* 365 Ill. 233; *People* v. *Smith,* 404 Ill. 125.

Defendant also assigns as error that he was prejudiced by the prosecutor's excessive use of leading questions while conducting the direct examination of the People's witnesses. To support this contention defendant has culled questions at random from various parts of the report of proceedings without regard to continuity or purpose of the examination. As presented, therefore, we have no means of determing, other than by search of the record, whether the questions complained of were proper or improper. In addition, it appears both that no objection was made to the admissibility of such evidence and that the alleged error was not raised upon the written motion for a new trial. It is fundamental that evidence introduced in the trial court, to which no objection is made, cannot be complained of for the first time on review, (*People* v. *Laster,* 413 Ill. 224,) and that alleged errors not raised upon the written motion for a new trial are waived. *People* v. *Cione,* 293 Ill. 321; *People* v. *Vickers,* 326 Ill. 290.

The remaining assignments of error require some consideration of the facts and circumstances from which this charge against defendant arose. The record discloses that defendant, an attorney had represented the complaining witness, Mabel Josephson, in several matters extending over a period of three years. Early in June 1952, when she was seven months behind with payments due the Western Federal Savings and Loan Association, she engaged defendant to negotiate a refinancing of the mortgage. Though the purpose is not shown it appears the defendant, on June 17, 1952, caused a land trust on the property to be created, and advanced the trustee's

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fee of $40. from his own funds. When negotiations with Western Fedeal reached a stalemate, defendant, on September 12, 1952, made arrangement with Avondale Savings and Loan Association to accept Mrs. Josephson's application for a new mortgage in the amount of $10,000 with smaller monthly payments. Avondale, it appears, customarily charged a "commission" for making loans computed at the rate of 2 per cent of the amount of the mortgage; thus the commission in the present case was $200.

On September 13, defendant took Mrs. Josephson to Avondale where she executed some documents pertaining to the new loan. There, pursuant to his instructions, she purchased a cashier's check for $235 in her name. Defendant then took her to the Cosmopolitan Bank where arrangements were made for the creation of a new land trust which would be acceptable to Avondale. There, according to the version of the complaining witness, defendant held a private conversation with a bank employee for some minutes, then returned and asked her to endorse the check over to him and give him an extra $5. After she had complied, defendant again conversed with the bank employee, then returned to the complainant telling her that everything had been taken care of, that her worries were over, and that she would start making payments on the new mortgage October 1. Defendant, for his part related that he been given the check and the $5 in payment of his fees and the $40.00 he had advanced, and that it was coincidental that payment had been made at the bank, and that the check totalled the amounts due Avondale and Cosmopolitan for commission and trustee's fee. In any event, defendant deposited the check in his own bank account and applied the proceeds to his personal use. On September 15, two days, after the parties had visited the Cosmopolitan National Bank, a new land trust was created for which the bank's initial charges were $35.

Soon after September 13, a letter of opinion ordered by Avondale from the Chicago Title and Trust Company, showed an unreleased mechanic's lien judgment and the existing first mortgage. Although Avondale mailed a copy of the opinion to defendant, he did nothing, and efforts by all concerned to locate him proved futile. About two months later Western Federal filed suit to foreclose their mortgage. When that occurred the complaining witness sought the help of Mr. Diehl, a real estate broker, to enable her to save the property. Diehl finally reached the defendant by telephone and inquired about the $240. Thereafter defendant appeared at the Josephson home and delivered a statement of the mortgage transaction in which he showed the sum of $240 as an item "on deposit." On January 23, 1953, Diehl arranged for defendant to be present for the settlement of the mechanic's lien on the Josephson property and when defendant was asked for the money Mrs. Josephson had given him to close the deal, he stated it was in a safe-deposit box and refused to go after it. The same day defendant accompanied Diehl to a meeting of the principal parties, at which an escrow agreement was signed, a stipulation entered into to dismiss the foreclosure suit, the old liens discharged, and a new mortgage executed. At that time defendant, who then had only $1.52 in his bank account, failed to produce the $240, and at no time thereafter did he return it. The indictment charges that on January 23, 1953, defendant fraudulently embezzled and converted to his own use the sum of $235.

Based upon the foregoing facts as testified to by witnesses for the prosecution, it is the theory of the People that defendant wrongfully converted the proceeds of the $235 cashier's check to his own use, after he had received the check for the specific purpose of applying the proceeds to the expenses of refinancing the mortgage, namely,

for the payment of Avondale's $200 commission, and Cosmopolitan $35 trust fee. Defendant, on the other hand, insists that both the $235 check and the $5 cash he received from Mabel Josephson were to compensate him in the amount of $200 for his services in negotiation the new loan, and to reimburse him in the amount of $40 for the money he had advanced at the time the original land trust was created. Consistent with his theory, defendant makes a contention that the evidence does not sustain the verdict and that there was and is a reasonable doubt of his guilt, urging largely that Mabel Josephson's testimony relating to the purpose for which the $235 check was given him "was formulated to suit the convenience of the prosecution," and that it was sheer coincidence that he was paid $240 in fees at a time when $235 in fees were owed to Avondale and Cosmopolitan.

In a criminal proceeding, the resolution of conflicting evidence and the determination of the credibility of witnesses is a matter exclusively within the province of the jury, whose findings will be given great weight. (*People* v. *Moretti*, 6 Ill. 2d. 494; *People* v. *McClain*, 410 Ill. 280.) A court of review will substitute its judgment for that of the jury only when it can be said from a careful consideration of all the evidence that there is clearly a reasonable and well-founded doubt of the guilt of the accused. (*People* v. *Smith*, 404 Ill. 125; *People* v. *Leach*, 308 Ill. 515.) Here the evidence as to the purpose for which the $235 was received is in direct conflict. It was for the jury to determine who was telling the truth and to decide whether it was mere coincidence that defendant's alleged fees were paid at the time and place they were. The jury could properly consider too that the People's version of the evidence received some support form the defendant's own written statement, delivered to the complaining wit-

ness, in which he included an item of $240 as being on "deposit," and from his later statement to Diehl that he had the money advanced to him in a safety deposit box. Considered in its entirety, we cannot say that the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt and are of the opinion the jury justified in reaching the result it did.

The record shows that on an occasion early in the trial, while outside the presence of the jury, the court, over the objection of defendant's counsel, ruled that evidence of previous transactions between defendant and the complaining witness would be admissible in the cause. Thereafter, during direct and redirect examination of several of its witnesses, the People introduced evidence tending to show the following: (1) that in 1952 the complaining witness had given defendant $50 with which to satisfy a mechanic's lien, previously referred to herein, but that he had failed either to satisfy the said lien or to account for the money; (2) that in a still pending estate, wherein complaining witness was the administratrix and the defendant her attorney, the latter had failed to account for approximately $420; (3) that in May 1952, defendant received $20 with which to accomplish a transfer of title to certain lots contained in the estate, which money was never applied for such purpose or accounted for; and (4) that in June, 1950, complaining witness had given defendant $350 with which to pay the taxes on said lots, but thus he failed to do so or account for the money. By his remaining assignment of error, defendant contends in various ways that the admission of testimony and exhibits pertaining to the previous transactions between himself and Mabel Josephson was erroneous in that such

such evidence was not relative to the offense charged in the indictment.

Where a specific intent is an essential element of a crime and the prosecution must prove this specific intent in order to secure a legal conviction, evidence of similar acts committed by the accused, happening at about the same time, is relevant and competent to show such intent. (*People* v. *Popescue*, 345 Ill. 142; *People* v. *Folignos*, 322 Ill. 304.) That such evidence proves or tends to prove an offense other than the one with which the accused is charged is never a valid objection to the admissibility. (*People* v. *Spaulding*, 309 Ill. 292.) Intent is a specific element of the crime of embezzlement. Consequently, proof of similar offenses is competent to show the intention of the defendant in the particular act of embezzlement charged in the indictment. (*People* v. *O'Malley*, 404 Ill. 165; *People* v. *O'Connell*, 386 Ill. 606; *People* v. *Duzan*, 272 Ill. 478.) Defendant argues that the similar acts proved were too remote from a standpoint of time to be admissible or competent. All of said acts, however, occurred within a two year period of time prior to the act of embezzlement for which the defendant was tried. When it is further considered that all of said acts occurred during one continuous period of an attorney-client relationship that existed between the defendant and the complaining witness until just prior to his indictment in this case, we are of the opinion that such acts were not so remote to the proceedings as to be admissible Cf. *People* v. *Duzan*, 272 Ill. 478.

The judgment of the criminal court of Cook County is affirmed.

Judgment Affirmed.

UNITED STATES OF AMERICA

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, begun and held in Springfield, on Monday the tenth day of September in the year of our Lord, one tousand nine hundred and fifty-six, within and for the State of Illinois.

Present: Ray I. Klingbiel, Chief Justice.
Justice Joseph E. Daily
Justice George W. Bristow
Justice Charles H. Davis
Justice Walter B. Schaeffer
Justice Harry B. Hershey
Justice
Latham Castle, Attorney General
Robert C. Miley Marshal
Attest: Fae I. Searcy, Clerk pro tempore

Be It Remembered, that, to-wit: on the 24th day of September, A. D. 1956, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

People State of Illinois, Defendant in Error No. 33831 vs. Loran S. Clark Plaintiff in Error	Error to Criminal Court Cook County

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of the and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.